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SUPREME COURT, U.S.

No. 84-6646

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1984

WILLIE LLOYD TURNER,

Petitioner,

v.

GARY BASS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the Fourth Circuit properly relied upon established decisions of this Court to hold that a capital defendant does not have a constitutional right to specifically question veniremen as to racial prejudice.

II. Whether a petitioner who has not properly presented his Witherspoon argument in state courts and who has repeatedly admitted that the evidence incontrivertibly showed his guilt may invoke Grigsby v. Mabry, ___ F.2d ___ (8th Cir., Jan. 30, 1985).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	3
REASONS FOR DENYING THE WRIT	
I. Petitioner's Argument That He Should Have Been Permitted To Specifically Question The Veniremen As To Their Possible Racial Prejudice Is Groundless Under Established Decisions Of This Court. Moreover, This Claim In Large Measure Has Been Procedurally Waived Due To Petitioner's Failure To Present Substantial Portions Of It On The State Level	5
II. Petitioner May Not Properly Rely Upon Grigsby v. Mabry, ___ F.2d ___ (8th Cir., Jan. 30, 1985), In View Of His Failure To Properly Raise It On The State Level And His Explicit Admission In Various State Pleadings That The Evidence Established Without Question His Guilt	8
CONCLUSION	14
CERTIFICATE OF SERVICE	14

TABLE OF CITATIONS

Cases

	Page
Anderson v. Harless, 459 U.S. 4 (1982).....	7,10
Cardinale v. Louisiana, 394 U.S. 437 (1969).....	7,10
Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985).....	12
Floyd v. Commonwealth, 219 Va. 575, 249 S.E.2d 171 (1978).....	12
Grigsby v. Mabry, ___ F.2d ___ (8th Cir., Jan. 30, 1985).....	8,9,10,12 13,14
Ham v. South Carolina, 409 U.S. 524 (1973).....	5,6
Hovey v. Superior Court, 28 Cal.3d 1, 616 P.2d 1301, 168 Cal. Rep. 128 (1980).....	9
McCleskey v. Zant, 753 F.2d 877 (11th Cir. 1985).....	7
Rector v. Arkansas, ___ U.S. ___, 80 L.Ed.2d 842 (1984).....	9
Ristaino v. Ross, 424 U.S. 589 (1976).....	6,7,8
Rosales-Lopez v. United States, 451 U.S. 182 (1981).....	6,7,8
Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), cert. denied, sub. nom., Parrigan v. Paderick, 419 U.S. 1108 (1975).....	10,12
Taylor v. Louisiana, 419 U.S. 522 (1975).....	9
Turner v. Bass, 753 F.2d 342 (4th Cir. 1985).....	2,3
Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980).....	2,11
Wainwright v. Witt, ___ U.S. ___, 53 U.S.L.W. 3647 (Mar. 5, 1985).....	9
Witherspoon v. Illinois, 391 U.S. 510 (1968).....	9,10,11,12
Woodard v. Sargent, 753 F.2d 694 (8th Cir. 1985).....	12,13

Other Authorities

Rule 59(e), Federal Rules of Civil Procedure.....	3
Rule 5:21 of the Rules of the Supreme Court of Virginia.....	10,12
Section 18.2-31(d), Code of Virginia, 1950, as amended.....	4

No. 84-

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WILLIE LLOYD TURNER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

The petitioner asserts that the jurisdiction of this Court is grounded upon 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are set forth in the Petition for Writ of Certiorari at 1.

PRELIMINARY STATEMENT

References to the Petition for Writ of Certiorari will be designated as "Ptn. ___." References to the Appendix to this Brief in Opposition will be designated as "App. ___."

STATEMENT OF THE CASE

Petitioner was indicted by the Southampton County Grand Jury on the charges of capital murder, use of a firearm in the commission of murder, and possession of a sawed-off shotgun in the commission of robbery. Prior to trial, a change of venue was granted and the trial was held in Northampton County. On December 3-6, 1979, petitioner was tried by a jury in the Circuit

Court of Northampton County. He was found guilty on all counts and received a death sentence, a one year sentence in the penitentiary, and life sentence in the penitentiary on the respective charges of capital murder, use of a firearm in the commission of murder, and possession of a sawed-off shotgun in the commission of robbery. On February 6, 1980, the trial court conducted a sentencing hearing and sentenced petitioner in accordance with the verdict of the jury. A final judgment order was entered on February 19, 1980.

Petitioner then filed a petition for a writ of error in the Supreme Court of Virginia. In a published opinion, the State Supreme Court affirmed the judgment in all respects. See Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980). A petition for rehearing was denied on January 16, 1981. Thereafter the United States Supreme Court denied certiorari. See 451 U.S. 1011 (1981).

Petitioner next filed a petition for a writ of habeas corpus in the Circuit Court of Southampton County on September 9, 1981. After respondent filed a Motion to Dismiss, a hearing on this Motion was held in the circuit court on November 10, 1981. On January 4, 1982, the circuit court issued a letter opinion stating that respondent's Motion to Dismiss was being sustained. On February 10, 1982, a final order was entered dismissing the petition for a writ of habeas corpus.

This order was subsequently appealed to the State Supreme Court. By order of January 11, 1983, the Supreme Court dismissed the appeal. (Record No. 820828). On June 6, 1983, the United States Supreme Court denied certiorari. 462 U.S. 1112.

Petitioner then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia at Norfolk. Turner v. Bass, Civil Action No. 83-501-N. An oral argument was conducted in the district court on March 26, 1984, to consider respondent's Motion to Dismiss. By order of May 23, 1984, the district court denied in full the habeas corpus petition. Petitioner thereafter filed a motion to

alter or amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. On July 19, 1984, this motion was denied.

After petitioner noted an appeal to the Fourth Circuit Court of Appeals, that Court stayed petitioner's execution until further order. On appeal, petitioner substantially raised each of the present contentions. On January 25, 1985, the Fourth Circuit rejected these as well as petitioner's other claims and affirmed the district court's denial of the habeas petition. See Turner v. Bass, 753 F.2d 342 (4th Cir. 1985). The Court also dissolved its previous stay. On March 4, 1985, the Fourth Circuit stayed the issuance of its mandate until March 17, 1985. On March 18, 1985, the circuit court issued the mandate. Petitioner's execution is currently scheduled for May 2, 1985; no stay of execution exists.

STATEMENT OF FACTS

As recited by the Supreme Court of Virginia in its written opinion, the facts in this case are that on July 12, 1978, petitioner entered Smith Jewelers located in Franklin, Virginia at about 11:20 A.M. Using a sawed-off shotgun, petitioner silently motioned the various customers and employees to line up against the counter of one side of the store and then forced the proprietor, W. Jack Smith, Jr., to stuff money from the cash register into some jewelry bags. While doing so, Smith was able to activate a silent alarm. Subsequently, a local police officer, A. D. Bain, Jr., came in and inquired as to why the alarm was on. Petitioner then forced Bain to give up his revolver to him and put it in his pocket while continuing to hold the shotgun in his right hand. Petitioner made the store owner turn the alarm off and fill up some more jewelry bags with store merchandise.

Petitioner then took the pistol from his pocket and put it in his right hand, switching the shotgun to his left hand. As he tossed the pistol, it discharged and a shot went towards the back

of the store. After Bain assured petitioner that no one was coming in the back, petitioner went to the middle of the room, "just looked at Mr. Smith and fired the [pistol] at" him, causing him to "yell like a puppy and [fall] to the floor...." As Smith slumped down behind the counter he began bleeding from a head wound. Medical testimony established that this first shot to Smith, while not the cause of his death, did produce injuries to his head and brain. Bain testified that petitioner had fired the shot at Smith from a distance of twelve to fifteen feet and had "just pointed right at [him] and fired" without warning.

At this point, Bain attempted to reason with petitioner and promised to take him out of town if he would not shoot anyone else. Petitioner, however, responded by saying: "I'm going to kill that nigger for snitching on me." As Smith lay helpless and "gurgling" on the floor behind the counter, petitioner approached him, looked down at him, and shot him two times in the chest in a "rapid fire" manner. These last shots, which hit Smith in the chest, caused him to jump; he did not move after that. Petitioner was not "nervous" or "shaking" but rather looked right over the counter as he shot Smith. Medical testimony demonstrated that each of these latter two shots would have been independently fatal. Subsequently, Bain was able to knock the firearms away from petitioner and subdue him until other police officers arrived on the scene.

On December 4, 1979, the petitioner was convicted by a jury of, inter alia, capital murder in the commission of a robbery in violation of § 18.2-31(d) of the Code of Virginia. At the penalty stage, evidence was introduced setting forth petitioner's extensive criminal record. Petitioner introduced testimony from the Chief of Police for the City of Franklin and from Bain relating to police procedures to be used in responding to silent alarms. On cross-examination, Bain stated that petitioner did not appear nervous while the robbery was in progress. Furthermore, there was a time lapse between the first shot wounding Smith and the last two fired from over the counter.

Thereafter, the jury recommended a sentence of death on December 6, 1979. The trial court then ordered a post-sentence report to be prepared and on February 6, 1980, it affirmed the jury's recommendation, finding that the sentence was appropriate.

REASONS FOR DENYING THE WRIT

I.

Petitioner's Argument That He Should Have Been Permitted To Specifically Question The Veniremen As To Their Possible Racial Prejudice Is Groundless Under Established Decisions Of This Court. Moreover, This Claim In Large Measure Has Been Procedurally Waived Due To Petitioner's Failure To Present Substantial Portions Of It On The State Level.

At trial, petitioner requested to have the prospective jurors specifically questioned as to whether the fact that the decedent was Caucasian and petitioner black would affect their fitness to serve. The trial court declined to ask this question. It did, however, ask a series of general questions focusing upon possible prejudices the jurors might have. See App. 1-4. Also, this case was tried only after there had been a change of venue to a non-contiguous jurisdiction.

Petitioner now relies upon a variety of historical, sociological, and statistical sources for his argument that he had a constitutional right in this case to have this question put to the veniremen. Respondent states, however, that this issue is not an appropriate ground for the granting of certiorari because the law in this area is settled. Furthermore, even if this Court wished to take a second look at the issue raised by petitioner, this case would not be an appropriate vehicle for such a review in light of petitioner's failure to present much of the present argument to any State court.

It is axiomatic that a trial judge on voir dire is "not required to put [a] question in any particular form, or to ask any particular number of questions on [a] subject simply because requested to do so by" a defendant. Ham v. South Carolina, 409 U.S. 524 (1973). Thus, in the absence of facts such as those

found in Ham (where a well-known civil rights activist claimed that the authorities were out to "get" him), a more generalized inquiry regarding bias is permissible. The two decisions of this Court subsequent to Ham, Ristaino v. Ross, 424 U.S. 589 (1976) and Rosales-Lopez v. United States, 451 U.S. 182 (1981), demonstrate that no constitutional right of petitioner's was violated in the case at bar. This Court in Ristaino stated that unless special circumstances comparable to those in Ham are present, there is no constitutional right "in a criminal trial between persons of different races or different ethnic origins" to conduct such an inquiry. 424 U.S. at 590. (emphasis added). Significantly, this Court rejected the defendant's "sweeping per se rule" that would constitutionally mandate such questioning in any case involving a crime of violence. Id. at 596 n.8.

There was not the slightest indication in Ristaino that the nature of the penalty could ever constitute such a special circumstance as was found in Ham. Logically, there is no reason to differentiate between capital and non-capital cases in the manner suggested by petitioner. This Court in Ristaino clearly held that in most criminal cases, a generalized inquiry into bias is sufficient to bring out the fact of such a predisposition. Petitioner has pointed to nothing in this case indicating that this conclusion is not equally applicable here. Nor has he pointed to any language whatever in Ristaino that would support his contention that that decision is not applicable to cases in which the jury determines the sentence.

The only subsequent case of significance is Rosales-Lopez v. United States. There, the Court in reaffirming Ristaino held that the Mexican defendant had no constitutional right to have the veniremen questioned as to possible racial or ethnic prejudice. This ruling was reached despite the acknowledgment that it "remains an unfortunate fact in our society that violent crimes perpetrated against members of other racial or ethnic

groups often raise" the possibility of racial prejudice influencing the jury. 451 U.S. at 192.

A review of the Fourth Circuit's decision in this case demonstrates that it correctly applied these decisions to reject petitioner's present claim. 753 F.2d at 344-46. Petitioner has not cited one case in the present petition which would raise the slightest question as to the correctness of the Fourth Circuit's ruling. As petitioner himself acknowledges, statistical claims somewhat comparable to his have consistently been rejected on the merits by federal courts. Ptn. at p.9. Petitioner can only point to McCleskey v. Zant, 753 F.2d 877 (11th Cir. 1985) in "support" of his argument. McCleskey, however, was decided adversely to the defendant in that case. To date, certiorari has not been granted in McCleskey. Accordingly, respondent submits that this decision hardly provides justification for a granting of certiorari in the instant case.

Moreover, even if this Court were inclined to re-examine its holdings in Ristaino and Rosales-Lopez, the present case is an inappropriate foundation for doing so. It is axiomatic that this Court will not decide federal constitutional questions raised for the first time in a petition for a writ of certiorari. See Cardinale v. Louisiana, 394 U.S. 437 (1969). Cf. Anderson v. Harless, 459 U.S. 4 (1982) (substance of federal habeas corpus claim must be presented to state courts, rather than somewhat similar state-law claims). Both on trial and on direct appeal to the Supreme Court of Virginia, the only study cited by petitioner on the present issue was the Northeastern University study by Bowers and Pierce. This study contained no statistics whatever as to any practices in Virginia. In ruling against petitioner on this issue the Supreme Court of Virginia noted that the study had been based upon statistics compiled in other states "and thus was of little utility in establishing the potential of prejudice in Virginia." 221 Va. at 523 n.9.

As petitioner acknowledges, the next time that he cited any other statistical studies in support of the present contention

was in a motion in the federal district court to alter or amend the judgment. This motion was based in part upon the 1983 study by Professors Gross and Mauro. Ptn. at p. 9 n.4. In this motion, petitioner explicitly acknowledged that this study was significantly flawed, at least as it related to the application of the death penalty in Virginia. See App. 5-6. In another pleading in the federal district court, petitioner made a similar concession regarding the Bowers and Pierce study. See App. 7-8. Likewise, in the present petition, petitioner acknowledges that Gross and Mauro could not label their own study as statistically significant. Ptn. at p.13.

Accordingly, because petitioner presented only one study to the State courts, which shed virtually no light whatever as to the application of the death penalty in Virginia, and because this and the only other study advanced in the federal district court were conceded by petitioner to be fundamentally flawed, he is not situated to seek certiorari on this issue. To the extent that petitioner relies upon any other studies, respondent submits that he has effectively tried to expand the record on appeal. In any event, particularly in view of petitioner's admission in the Fourth Circuit that there was nothing in the facts of this particular case suggestive of racial antagonism, 753 F.2d at 346, Ristaino and Rosales-Lopez were properly relied upon by the State and federal courts to reject the present proposition.

II.

Petitioner May Not Properly Rely Upon Grigsby v. Mabry, ___ F.2d ___ (8th Cir., Jan. 30, 1985), In View Of His Failure To Properly Raise It On The State Level And His Explicit Admission In Various State Pleadings That The Evidence Established Without Question His Guilt.

In his petition, Turner contends that this Court may grant certiorari in Grigsby v. Mabry, supra, and because that case may potentially afford him relief, at the very least the present case should be stayed pending a resolution of Grigsby. Respondent, however, states that petitioner is not properly able to rely upon

Grigsby due to his failure to present this claim on the state level and, further, his waiver of any challenge to his guilt or the impartiality of the jury in the guilt phase.

First, the present claim is of course highly speculative. Certiorari has not been granted in Grigsby; a petition has not even been filed. Significantly, this Court has denied certiorari in several other cases in which Grigsby had been invoked. See, e.g., Wainwright v. Witt, ___ U.S. ___, 53 U.S.L.W. 3647 (Mar. 5, 1985); Rector v. Arkansas, ___ U.S. ___, 80 L.Ed.2d 842 (1984). In Rector, the joint request of the defendant and the state to grant certiorari was denied.

Respondent submits that this case is no different from Witt and Rector. It is important to note the precise nature of the arguments advanced in Grigsby and the limited nature of its holding. Three related but distinct prongs underlie the statistically--based argument accepted in Grigsby that the application of Witherspoon v. Illinois, 391 U.S. 510 (1968) unconstitutionally deprives a capital murder defendant of his right to a fair and impartial jury. It is first asserted that the very process of conducting the voir dire under Witherspoon tends to have a psychological impact upon the qualified juror which works to the detriment of the defendant. See, e.g., Grigsby v. Mabry, 569 F. Supp. 1273, 1303-04 (E.D. Ark. 1983); Hovey v. Superior Court, 28 Cal.3d 1, 616 P.2d 1301, 168 Cal. Rep. 128, 174-78 (1980). The second contention is that a capital defendant's right to a jury that reflects a fair cross-section of the community, see generally Taylor v. Louisiana, 419 U.S. 522 (1975), is violated by the exclusion of jurors absolutely opposed to imposition of the death penalty. Finally, opponents of Witherspoon claim that the removal of veniremen pursuant to Witherspoon results in a jury that is overly conviction-prone.

None of these arguments, however, has the slightest reference to the penalty stage of the proceedings. The court in Grigsby carefully limited its consideration of these statistical studies to their claimed effect in the guilt phase of capital

prosecutions. It did not hold that veniremen absolutely opposed to capital punishment may properly serve in the penalty phase.

A review of the state court pleadings previously filed by petitioner demonstrates that he did not comply with Rule 5:21 of the Rules of the Supreme Court of Virginia, the Commonwealth's contemporaneous objection rule, or Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), cert. denied, sub. nom., Parrigan v. Paderick, 419 U.S. 1108 (1975), which bars habeas review of a new claim that could have been raised at trial or on appeal. Thus, he may not now invoke Grigsby. See Cardinale v. Louisiana, supra; Anderson v. Harless, supra.

At trial, petitioner raised none of the present arguments. He cited no statistical studies whatever and merely asserted without elaboration that it was improper for the prosecution in this one kind of case to be able to ask prospective jurors "as to their feelings or their propensity to give or not to give a certain punishment." See App. 9-11. Significantly, defense counsel acknowledged: "This case has never been about guilt or innocence from beginning to end. This case has been about the decision that you are to make now. There was no question of the defendant's guilt. There are some real questions about the punishment...." See App. 12.

On appeal, petitioner repeatedly argued that various rulings of the trial court had prejudiced him in the penalty phase of the trial. Counsel stated, however, that there was "no serious question about [petitioner's] guilt. The only question throughout the proceedings was whether Willie Lloyd Turner should be put to death." See App. 13. As to Witherspoon, petitioner merely argued that a "death-qualified" jury is "preconditioned to favor the death penalty." See App. 14-15. Of the three arguments previously described that have been used to attack Witherspoon, petitioner raised only the first. The only studies cited by petitioner were in support of this proposition concerning the alleged psychological impact of Witherspoon upon

the veniremen. Such a jury was asserted to be much less reluctant "to impose the death penalty" upon a defendant.

In its written opinion affirming petitioner's conviction, the Supreme Court of Virginia stated that it rejected his contention that the trial court should not have questioned prospective jurors as to their ability "to impose capital punishment." Turner v. Commonwealth, supra, 221 Va. at 524. Subsequently, petitioner filed the first of his petitions for writs of certiorari in this Court. He stated in this petition that he was not challenging "the ability of any of the jurors to render an impartial decision as to guilt" but was contending that the responses of one venireman did not sufficiently demonstrate his absolute aversion to the death penalty. See App. 16.

Petitioner then sought habeas relief in the Circuit Court of Southampton County. In a cursory claim, he repeated his previous contention that the process of qualifying a jury under Witherspoon prejudices the defendant. See App. 17-20. Arguably, he also asserted for the first time that a Witherspoon-qualified jury is too prosecution-oriented in the guilt as well as the penalty stage of a trial. Clearly, however, he did not assert that such a jury violates a defendant's right to a fair cross-section of the community. The circuit court in any event treated this claim as simply reiterative of what had been raised on appeal and rejected by the Supreme Court of Virginia. See App. 21-22. The court implicitly indicated that any claim deemed to raise new matters was procedurally barred.

In his appeal of this dismissal to the Supreme Court of Virginia, petitioner did not attack this ruling. He did, however, repeat his previous concession that "there [could] be no serious question about the guilt of the petitioner. The only significant issue [was] the appropriate sentence." See App. 23-24. In the subsequent petition for a writ of certiorari in this Court, petitioner repeated in identical language this characterization of the case. See App. 25-26.

Respondent submits that petitioner failed to comply with Rule 5:21 and Slayton v. Parrigan, supra and has in any event explicitly waived his right to rely upon the holding in Grigsby. Rule 5:21 requires an objection to be stated with reasonable certainty at the time of the ruling. The Supreme Court of Virginia has strictly invoked the sanctions of this Rule. See, e.g., Floyd v. Commonwealth, 219 Va. 575, 584, 249 S.E.2d 171 (1978).

Thus, it is clear that Rule 5:21 and Slayton v. Parrigan would bar appellate or habeas review of any Grigsby claim. At trial, petitioner made no argument comparable to Grigsby. On appeal, the Supreme Court of Virginia clearly understood his argument to challenge Witherspoon only as it related to the penalty phase of the trial. On state habeas, petitioner's Witherspoon allegation was dismissed as repetitive by the circuit court. Petitioner waived any right to challenge the correctness of this ruling by not assigning this as error in his appeal of the habeas dismissal to the Supreme Court of Virginia.

Further, it is apparent that at no point on the state level has petitioner ever asserted that his right to a jury representing a fair cross-section of the community was violated. Yet, a cursory reading of Grigsby demonstrates that the Eighth Circuit's decision was largely premised on the conclusion that Witherspoon brought about such a violation. See Slip Op. at 4-9, 29-32.

Under all of these circumstances, respondent submits that the petitioner simply cannot derive any benefits from any future ruling by this Court in Grigsby. Even the Eighth Circuit would not apply Grigsby to the case at bar. For example, in Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985), decided one day after Grigsby, the court rejected a claim of ineffective assistance of trial counsel in not citing Grigsby due to the lack of prejudice arising from the overwhelming proof of guilt.

Similarly, the Eighth Circuit in Woodard v. Sargent, 753 F.2d 694 (8th Cir. 1985), considered the applicability of Grigsby

to a case in which the record did not clearly demonstrate whether the argument had been advanced or considered on the merits on the state level. The Court ultimately concluded that this claim had been substantively rejected by the Supreme Court of Arkansas. It did so, however, only on the basis of an Arkansas state rule which required review of issues raised for the first time on state habeas which were "fundamental" to the judgment. The circuit court concluded that Arkansas deemed the Grigsby argument to be such an issue. It is apparent from the opinion, however, that in the absence of such a provision, the Eighth Circuit would not have considered Grigsby due to the petitioner's state procedural default. Thus, applied to the case at bar, Woodard bars review of petitioner's Grigsby claim.

Respondent further asserts that petitioner cannot properly invoke Grigsby due to his repeated admission of one obvious but critical fact--namely, that the evidence proved beyond any doubt that he had committed capital murder. Several individuals in the jewelry store were eyewitnesses to the slaying of the decedent. The only serious argument advanced in the guilt stage was the purely technical defense that the asportation necessary to establish the predicate felony of robbery had not been proven. At the conclusion of the Commonwealth's case the trial court refused to grant petitioner's motion to strike the prosecution's evidence on this ground. This of course was an issue for the trial judge, rather than the jury, to resolve. The court having resolved this issue adversely to petitioner, there could be no question as to whether any jury would find him guilty of capital murder.

The only real issue in this case, as trial counsel acknowledged five and one-half years ago, was what punishment petitioner would receive. In view of petitioner's twin admissions that the evidence incontrovertibly established his guilt and that the jurors impartially determined his guilt,

respondent submits that Grigsby is insufficient to justify the granting of certiorari here.

CONCLUSION

For the foregoing reasons, respondent submits that the granting of certiorari in this case is inappropriate. Petitioner has not preserved his right to present these claims on the merits in this Court. Nor has he shown any substantial likelihood that this Court would review either of the present issues or afford him relief. Accordingly, respondent prays that this Court deny the petition for certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of April, 1985, a copy of the foregoing Respondent's Brief in Opposition was mailed to J. Lloyd Snook, III, Esquire, Paxson, Smith, Gilliam & Scott, P. O. Box 2737, Charlottesville, Virginia 22902, counsel for petitioner.

Robert H. Anderson III

Robert H. Anderson, III
Assistant Attorney General

APPENDIX

their names slowly.

THE CLERK: I ask you all to raise your right hand.

(The jurors were sworn on voir dire.)

THE COURT: Be seated in the jury box, please.

THE CLERK: As I call your name, would you just raise your right hand. James Warren Smith, Ellen Chandler, James Smith, Jessie Moodie and J. Ashby Lecato.

(The jurors were identified.)

THE COURT: Lady and gentlemen, the case that we have here today -- the cases -- are Commonwealth of Virginia versus Willie Lloyd Turner, and the defendant, Willie Lloyd Turner, is represented by Mr. William R. Savage of Suffolk, and Mr. Thomas L. Woodward, Jr., of Suffolk. The Commonwealth of Virginia is represented by Mr. Richard C. Grizzard, Commonwealth's Attorney of Southampton County, and the defendant is charged with use of a firearm in the commission of a felony. He's charged with possession of a sawed-off shotgun in the perpetration of a robbery of Alan D. Bain. He's charged with the capital murder of -- the killing of W. Jack Smith, Jr., while in the

commission of a robbery while armed with a deadly weapon.

Now, all of these offenses are alleged to have happened on the 12th day of July, 1973, in the City of Franklin, Virginia.

Now, are any of you related by blood or marriage to any of the attorneys involved in this case, to the defendant or to Alan D. Bain or W. Jr. Smith, Jr.?

Are any of you related to any of these people?

Do any of you have any knowledge with reference to these cases?

Have you heard them discussed?

Have you read, seen or heard any news articles of the facts of this case or the charges against the defendant?

Have any of you read anything or heard anything or seen anything about these cases?

Have you heard anyone discuss this case in any way?

Have any of you formed any opinion with regard to the guilt or innocence of the defendant, Willie Lloyd Turner?

Have you or any members of your family been

a victim of any crime?

Are you related by blood or marriage to any person who is employed as a police officer or any other law enforcement officer?

Now, one of the charges, the alleged charge of murder of W. Jack Smith, Jr., is a capital case and carries the possibility of the death penalty, if convicted.

Mrs. Chandler, do you have any religious or conscientious scruples or objections against the imposition of a death sentence?

MRS. CHANDLER: Under some circumstances.

THE COURT: Could you in a proper case impose the death penalty?

MRS. CHANDLER: I think if I felt that the person --

THE COURT: Would you please just answer yes or no, please.

MRS. CHANDLER: Yes. I guess I could.

THE COURT: Then is your objection to the death penalty absolute?

MRS. CHANDLER: No.

THE COURT: Do you feel that every person convicted of the murder of another person should receive the death penalty?

THE COURT: Do you feel that in each and every case where a person is convicted of murder should receive the death penalty?

MR. LECATO: No, sir.

THE COURT: Now, do any of you know any reason whatsoever why you cannot render a fair an impartial verdict in this case?

Do any of you know any reason whatsoever w you should not serve as a member of the jury in this case?

MR. GRIZZARD: May counsel approach the bench, Your Honor?

THE COURT: Yes.

(A side-bar conference was held by the Court with counsel for both sides out of the hearing of the jurors and the court reporter.)

THE COURT: All right, Sheriff. Would you take these members of the jury panel.

(The jurors went into the jury room.)

THE COURT: All right, Mr. Grizzard.

MR. GRIZZARD: May it please the Court, Commonwealth would ask that Mrs. Chandler be brought back for further questioning. The answers she gave to the Court's voir dire are equivocal at best and confusing. I think she has not made a clear

For the purposes of an offer of proof in support of this Motion, Petitioner submits herewith a copy of the Gross and Mauro study, "Patterns of Death," as Petitioner's Exhibit One. That study was done in eight states; Georgia, Florida and Illinois are discussed at length in the body of the article (that portion of the article has not been submitted to this Court, because of its marginal relevance; that is why pages 42 through 90 are missing), while the results from Arkansas, Mississippi, North Carolina, Oklahoma and Virginia are described briefly in the text and presented in summary form in an appendix. The results from those five states, including Virginia, are summarized beginning at page 91.

Gross and Mauro caution that the statistics from Virginia, if viewed in isolation, may be suspect because the number of death sentences reviewed -- 19 -- was simply too small.

> Considered in isolation, such small numbers make any sentencing pattern hard to discern: only very strong effects can be seen clearly with so few observations. Some of the racial disparities that we report would not, on their own, constitute convincing proof of racial discrimination; this is particularly true for Arkansas and Virginia, in each of which we studied fewer than twenty death sentences. If we were examining the data from one of the states separately from the rest we would conclude that there is good reason to suspect racial discrimination in capital sentencing -- indeed, that it is more likely than not -- but that it is too early to tell for sure. But we are not considering these states in isolation, and we are not primarily interested in determining the existence of racial discrimination in any particular state.
>
> Viewed collectively, the data from these five states show a remarkably consistent pattern of racial disparities.

Pre-publication draft at 91-92. The study concluded that

> In Virginia the odds of receiving the death penalty for killing a white were 2.41 times greater than the odds of receiving the death penalty for killing a black.

Id. at 96. Because of the small sample size, this number, taken by itself and out of the context provided by the other states, is not statistically significant proof that the race of the victim has an effect on the probability of receiving the death penalty. Id. at 94. However,

> When we examined the effect of the race of the victim in models that included the race of the suspect as a variable the general picture remained essentially unchanged. In North Carolina the race-of-victim effect became smaller and statistically non-significant; in the remaining four states -- Oklahoma, Mississippi, Virginia, and Arkansas -- the effect became larger.

Id. at 96-97.

This evidence is precisely the point of our claim -- even if the data is not sufficient at this point to prove that the death penalty is being discriminatorily applied in Virginia, a contention that can only be sustained if the data from the rest of the country is ignored, it is certainly sufficient to raise a strong question about the possible impact of racial bias in the decision of a jury to impose the death sentence. Even if the data is therefore insufficient to strike down the death penalty statutes, it is clearly sufficient to support counsel's timely request for voir dire on racial prejudice in a case in which a black man is accused of killing a white man.

We ask this Court to do either or both of the following:

At trial, Petitioner introduced a study (Defendant's Exhibit 1), admittedly not based on Virginia data, showing the discriminatory manner in which the death sentence has been imposed in Georgia, Florida, Texas, Alabama and Ohio. Aggregating the data from the five states, it may be seen that the probability of receiving the death sentence for criminal homicide between the effective date of the various states' post-Furman statutes through December, 1977, is very much a function of the race of the victim and the particular offender/victim racial combinations. For example, the death sentence was imposed in 377 of 9,094 cases in which a white was killed, or 4.15% of the cases. The offender received the death sentence in 53 of 9,850 cases in which the death sentence was imposed, or .54% of the cases. In short, if someone kills a white, he is eight times more likely to receive the death sentence than if he kills a black. Similar aggregate totals may be computed for each of the offender/victim racial combinations:

	Estimated Number of Offenders	Persons Sentenced to Death	Probability of a Death Sentence
Black kills White	1,131	165	14 59%
White kills White	7,963	212	2.66%
Total -- White Victim	9,094	377	4.15%
Black kills Black	9,451	51	.54%
White kills Black	399	2	.50%
Total -- Black Victim	9,850	53	.54%
Total -- All Victims	18,944	430	2.31%

The numbers are similar if the class of cases is narrowed somewhat to include only felony-type murders.

	Estimated Number of Offenders	Persons Sentenced to Death	Probability of a Death Sentence
Black kills White	443	100	22.57%
White kills White	857	123	14.35%
Total -- White Victim	1,300	223	17.15%
Black kills Black	441	17	3.85%
White kills Black	50	2	4.00%
Total -- Black Victim	491	19	3.87%
Total -- All Victims	1,791	242	13.47%

From this very rough data, two trends may be noted. First, there appears to be a very strong likelihood that the race of the offender and the race of the victim (and, in particular, the way in which those two variables interact) will have a very large effect upon whether a particular defendant receives the death sentence. This is true across the country, as the survey from Georgia, Florida, Texas, Alabama and Ohio shows. The Virginia Supreme Court dismissed this data out of hand, as not having been related to Virginia.

With the data that we do have, we can see, in rough outline, that there is certainly a disparate impact upon blacks, and, particular, upon blacks who kill whites. Petitioner will be the first to concede that the data that he has thus far accumulated on Virginia is not subject to rigorous statistical analysis. But the data does raise a showing of disparate impact that is strong enough that this court should allow further inquiry.

At the state hearing on the habeas petition, counsel for Petitioner represented to the court that a study similar to

though, we're asking something of people which really probes their soul and that's their feeling as to the death penalty.

First of all, whether they have an automatic objection to the death penalty in any case, which is the exclusionary standard; but, in addition to that, we contend we should be allowed to inquire of them whether one believes that the death penalty should be imposed in any case where murder is the crime charged; whether it is in this case, as the indictment alleges, murder in the commission of a robbery or whether any type of murder which, of course, is an unlawful killing. If the Court would consider -- and I'm sure you have previously -- the other cases decided since the amendment of our death penalty statute -- Michael Darnell Smith. In that case, counsel -- both Commonwealth Attorney and defense counsel -- inquired of jurors and in the Supreme Court opinion, we find that Mr. Person and, I believe it was, Mr. Pugh, asked a particular juror those proposed questions which allowed the answers -- which allowed the Court subsequently to make its finding as to whether that juror should be allowed to be seated on a jury.

In all the cases, the seven which have been

voir dire and its method is within the discretion of the Court. I'm going to ask the questions on voir dire. I will place five jurors in the box and question them in panels of five with the exception of the question of the death penalty, which I will ask each individual juror. Now, are there any questions that you want the Court to specifically ask the members of the jury on voir dire?

MR. WOODWARD: Your Honor, might we except to the Court's ruling as to the method it will follow?

THE COURT: I will overrule your motion and note your exception in the record.

MR. WOODWARD: Mr. Savage has the questions which we are asking to be propounded. We would ask that Mr. Grizzard present his first since, of course, he is the moving party.

MR. GRIZZARD: Your Honor, I have previously submitted to the Court in the light of the Court's instructions the two questions of the Commonwealth that be asked on voir dire. For the record, I would submit that, Your Honor, as the questions of the Commonwealth.

THE COURT: All right, gentlemen.

MR. SAVAGE: Judge, in not one case that is

tried in the Commonwealth of Virginia we have [illegible] state, to my knowledge, whether it be civil or criminal, is any question asked of the jury as to their feelings or their propensity to give or not to give a certain punishment. In the former capital cases, whether it was murder or robbery, no question was asked of the jury whether or not they would or would not give it -- whether they would give life imprisonment; whether they would favor five or ten years or jail sentence or any other options known or unknown to a jury. In the capital murder case, however, we find the Commonwealth posing the question in which he wants to ask the jury whether or not they have any objection to the death penalty. If they answer the question he proposes to find out whether their objection is absolute, the asking of this question itself and the striking of any jurors on the basis of the answer is a denial of this defendant's right to due process, to equal protection of the law compared with other criminal cases, violation of the Fifth, Sixth and Fourteenth Amendment to the federal Constitution and, despite the fact that this matter has been ruled on by our state Supreme Court, we move that this question not be asked.

that has not been any more pleasant for us or you or anybody else. The very facts of the case, talking about death and killing, are not a happy subject for anybody. Frankly, I realize that we did you no kindness. We did you no favor by bringing this case over here to Northampton County. We brought the case over here to you this week for the life of our client.

This case has never been about guilt or innocence from beginning to end. This case has been about the decision that you are to make now. There was no question of the defendant's guilt. There is some real question about the punishment and so we present the case to you. The whole decision has been laid upon you and not you as a group. Each of you individually. You are 12 people, but your verdict must be unanimous. The Judge has said you may not vote as a group. You do not act or react by majority vote and each of you must make your own decision and carry it with you today and from today. You cannot say, "I was under the influence of the group. I was one or two or three against the rest." Each of you must stand individually. While your vote is a vote, your vote must be unanimous and if any one of you does not

> We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.

ckett v. Ohio, 438 U.S. 586, 604 (1978). The United States preme Court held that a jury must be given every chance to tence a defendant to life imprisonment rather than death, ause the risk that someone undeserving of the death penalty nt be executed is "unacceptable and incompatible with the mands of the Eighth and Fourteenth Amendments." Id. at 605.

Because the decision is so important, and the sequences so final, legislatures and appeals courts have been more careful to circumscribe and channel the jury's scretion. See, e.g., Furman, supra; Gregg, supra; Lockett, pra. Trial courts and appeals courts alike have been more licitous of the jury's role in the sentencing process -- eater attention is paid to jury selection and deliberation, for ample. This Court has very recently exhibited just that degree of solicitude in Justus v. Commonwealth, 220 Va. ___ (slip opinion, April 18, 1980), reversing a conviction because a Mrs. Swain, a prospective juror, was not sufficiently impartial, and in Johnson v. Commonwealth, 220 Va. ___ (slip opinion, June 8, 1979), reversing a conviction because the jury instructions were not sufficiently clear.

This case is entirely typical; there is no serious question about guilt. The only question throughout the proceedings was whether Willie Lloyd Turner should be put to death. Virtually all of the assignments of error presented in

procedural safeguard to help insure an impartial jury, a safeguard within the discretion of the trial court. Where it is "necessary to obtain an unbiased and unprejudiced jury," Dean, supra, at 668, it is error for the trial court to refuse a timely motion. When denial of counsel's motion presents the court and counsel with such a Hobson's choice, a defendant's constitutional rights to a jury known to be impartial are abridged. In this case the trial court abused its discretion by refusing defense counsel's repeated reasonable requests for individual voir dire.

E. The trial court erred in allowing the jury to be "death-qualified" by asking the veniremen questions about their attitudes toward the death penalty, a process which produces an unrepresentative jury and a jury that has been preconditioned to favor the death penalty.

The two proposed voir dire questions suggested by the Commonwealth both dealt with whether the juror could impose the death penalty. The juror was first asked whether he had any scruples against the imposition of the death penalty; next he was asked if those scruples were absolute so that he could never vote for the death penalty in a proper case. Defense counsel objected to the court's decision to pose those two questions to the jurors (R. 75-77), objecting on the grounds that asking the questions results in a "death-prone" jury, more likely to convict and to sentence a defendant to death than a similar group of 12 men and women who have not had the same questions asked of them. The only jurors who get on the jury are those who have already been forced to say out loud, in open court and before one another,

they could impose the death penalty. Such a jury is nstrably less reluctant than a non-death-qualified jury to ose the death penalty on the defendant. See Bronson, On the riction Proneness and Representativeness of the Death-lified Jury, 42 U.Colo.L.Rev. 1 (1970); H. Zeisel, Some Data uror Attitudes Towards Capital Punishment (1968), published he Center for Studies in Criminal Justice, University of ago Law School.

The evidence is clear from psychologists and hiatrists that a jury that has once responded that they could fact impose the death penalty is more likely to do so again their peers, and so the "death-qualifying" process confers unfair advantage over the defense in the battle for the tions of the jury. The most important psychological barrier been overcome. To allow the prosecution to ask the veniremen ether they could impose the death penalty in a proper case nied the defendant his right to a trial by a jury that has no preconceived notions or preconditions about punishment.

F. It was error for the trial court to refuse to sequester the jury during the trial, as requested by defendant.

Well aware of the adverse publicity surrounding the trial, even after the change of venue to Northampton County, defense counsel moved to have the jury sequestered. Counsel knew that there would be more adverse publicity each day because of the sensational nature of the case. Furthermore, Morris Mason,

> those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

Witherspoon, supra, at 522-23, n.21 (emphasis in original). Petitioner is not challenging in this Petition the ability of any of the jurors to render an impartial decision as to guilt; the question here is whether Samuel Cypress' answer "made unmistakably clear" that he would not be willing or able to follow the trial court's instruction in determining whether to impose the death sentence.

This Court noted in Witherspoon, and again in Boulden, that the question is really whether the venireman would be able to follow the law and instructions of the court, no matter how strong his fixed opinion against capital punishment.

> [I]t is entirely possible that a person who has "a fixed opinion against" or who does not "believe in" capital punishment might nevertheless be perfectly able as a juror to abide by existing law -- to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case.

Boulden, supra, at 483-84; see also Witherspoon, supra, at 519. Compare also the facts of Lockett v. Ohio, 438 U.S. 586 (1978), with Adams v. Texas, supra; in Lockett, this Court found no fault with voir dire seeking to elicit from the veniremen a promise to follow the instructions of the court, while in Adams, this Court struck down a requirement that each venireman swear that "the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact." If a court intends to exclude a venireman on the basis of his or her feelings about the death penalty, it may only do so if that venireman shows that he or she could not follow the instructions of the court.

The Witherspoon rule is based on the principle that both the prosecution and the defense are entitled to a jury of men and women who will follow the court's instructions. The proper inquiry,

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jury constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, §9 of the Constitution of Virginia.

20. (IV) The trial court erred in permitting the jury to impose the death penalty based on a finding that Petitioner's conduct was "outrageously or wantonly vile, horrible or inhuman" in that Petitioner's conduct did not meet the requirements of Smith v. Commonwealth or Godfrey v. Georgia; imposition of the death penalty in this case therefore constitutes cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §9 of the Constitution of Virginia.

21. (V) The trial court erred in failing to grant Petitioner's motions, based on the extensive publicity and media coverage, for a continuance and for sequestration of the jury, in violation of Petitioner's right to a trial by a fair and impartial jury and his right to the Due Process of Law, rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 8 and 11 of the Constitution of Virginia.

22. (VI) The trial court's denial of Petitioner's counsel's timely request that they be permitted to join in voir dire of the prospective jurors violated Petitioner's rights to the effective assistance of counsel, to a trial by a fair and impartial jury, and to the due process of law, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 8 and 11 of the Constitution of Virginia.

23. (VII) The trial court's examination of the jurors on their views on the death penalty resulted in a jury that was biased against Petitioner both as to guilt and sentence, in violation of

Petitioner's right to a fair and impartial jury trial and to the due process of law, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 8 and 11 of the Constitution of Virginia.

24. (VIII) The trial court's action in disqualifying juror Samuel Cypress violated the ruling of the United States Supreme Court in Witherspoon v. Illinois, and denied your Petitioner his right to a trial by a fair and impartial jury in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §8 of the Constitution of Virginia.

25. (IX) The trial court's failure to permit individual voir dire, to allow any questioning into the racial attitudes of jurors, to probe the jurors' understanding of the presumption of innocence, reasonable doubt, and burden of proof, and to fully question jurors about their views on the death penalty deprived Petitioner of his rights to a trial by a fair and impartial jury and to due process of law under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§8 and 11 of the Constitution of Virginia.

26. (X) Because no robbery was committed, Petitioner could not be guilty of murder in the commission of a robbery; his death sentence is thus disproportionate and excessive, in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §9 of the Constitution of Virginia.

27. (XI) The jury returned verdicts of "guilty" on both use of a firearm in the commission of a felony and capital murder during a robbery committed while armed with a deadly weapon, in violation of the Double Jeopardy Clause of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, §8

violated Petitioner's rights to the effective assistance of counsel, to a trial by a fair and impartial jury, and to the due process of law, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 8 and 11 of the Constitution of Virginia.

57. Trial counsel timely requested that they be permitted to join in the voir dire of the prospective jurors; the request was based largely on Va. Code Ann. §8.01-358, but also on the Sixth and Fourteenth Amendments to the United States Constitutions. The request was denied, to which counsel noted their exceptions.

58. The court then proceeded to conduct the voir dire personally, asking some, but not all, of the questions suggested by defense counsel.

59. For reasons elaborated on in Count IX, infra, the voir dire was not adequate to ensure Petitioner a fair and impartial jury.

60. Petitioner was therefore denied his constitutional rights to the effective assistance of counsel, to a trial by a fair and impartial jury, and to the due process of law, rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§8 and 11 of the Constitution of Virginia.

VII. The trial court's examination of the jurors on their views on the death penalty resulted in a jury that was biased against Petitioner both as to guilt and sentence, in violation of Petitioner's right to a fair and impartial jury trial and to the due process of law, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 8 and 11 of the Constitution of Virginia.

61. Petitioner requested that the veniremen not be "death-qualified" -- that they not be examined as to their views on the death penalty; that request was denied, and the veniremen were

examined on the death penalty.

62. Scientific evidence shows that death-qualified juries are significantly more likely than non-death-qualified juries to impose the death penalty.

63. Scientific evidence shows that death-qualified juries are also significantly more "prosecution-prone" than non-death-qualified juries, resulting in a greater likelihood that the defendant will be convicted of a capital crime.

64. The process of death-qualifying a jury, therefore, results in a jury that is biased in favor of the prosecution both as to the guilt or innocence and as to sentence, in violation of Petitioner's rights to a trial by a fair and impartial jury and to the due process of law.

VIII. The trial court's action in disqualifying juror Samuel Cypress violated the ruling of the United States Supreme Court in Witherspoon v. Illinois, and denied your Petitioner his right to a trial by a fair and impartial jury in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §8 of the Constitution of Virginia.

65. When venireman Samuel Cypress was questioned on voir dire concerning his attitude toward the death penalty, his answers were inconclusive. He was never asked whether his objections to the death penalty were so strong as to render him incapable of abiding by existing law by following the instructions of the trial court. See Boulden v. Holman, 394 U.S. 478, 483-84 (1969).

66. The constitutional protection of a fair and impartial jury requires that only veniremen who have "made [it] unmistakably clear that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be

Commonwealth of Virginia

JAMES C. GODWIN
JUDGE
SUFFOLK, VIRGINIA 23434

BENJAMIN A. WILLIAMS, JR.
JUDGE
COURTLAND, VIRGINIA 23837

C. EVERETT BAGNELL
JUDGE
SUFFOLK, VIRGINIA 23434

Fifth Judicial Circuit

January 4, 1982

CITIES OF
SUFFOLK
FRANKLIN

COUNTIES OF
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In Re: Willie Lloyd Turner v. Edward C. Morris, Superintendent

Gentlemen:

I have concluded that all of the issues raised in Willie Lloyd Turner's petition for habeas corpus, except those challenging the internal procedures of the Virginia Supreme Court, and ineffective assistance of counsel have already been decided by the Supreme Court on appeal.

As to the issue of whether or not the internal procedures of the Virginia Supreme Court are adequate for the protection of the petitioner's rights, this court has neither the authority nor the jurisdiction to decide it. This matter, if an issue at all, must be raised with the Virginia Supreme Court, not the Circuit Court. Based on the allegations in the petition, I could find nothing wrong with the procedures in any event.

Generally, a plenary hearing should be held to determine the issue of ineffective assistance of counsel but, in this instance, the focal point is on the treatment the attorneys gave the psychiatric testing and evaluation. A review of the record indicates that an independent, competent psychiatrist was allowed by the Court to evaluate Willie Lloyd Turner. The pertinent issues resulting from this testing and evaluation were raised by defense counsel. The problem with the psychiatrist's testimony was not due to ineffective assistance of counsel. Defense counsel very skillfully presented their psychiatric evidence to the Court and the jury, only to have the psychiatrist fail to hold up under vigorous cross-examination. This could not be pre-determined by defense counsel.

Having heard numerous pretrial motions, five days of actual trial, including many exceptions and motions made during and after trial, and after having reviewed the transcript, I find that the defendant, Willie Lloyd Turner, had excellent representation. His counsel were both experienced trial lawyers, competent to try the most serious criminal matters.

For the above reasons, I sustain the Motion to Dismiss the petition for a writ of habeas corpus and request the Attorney General to prepare the necessary order.

Yours very truly,

James C. Godwin

JCG:db
cc: Honorable Wayne M. Cosby, Clerk
Circuit Court of the
County of Southampton

W. R. Savage, III, Esquire
Attorney at Law

Thomas L. Woodward, Jr., Esquire
Attorney at Law

filed 1/7/81

In addition, counsel for Petitioner, at oral argument on November 10, 1981, proffered to the court that Petitioner's evidence would show that:

1. Trial counsel had not consulted with any psychiatrists or psychiatric texts in an effort to learn about the psychiatric issues involved in the case, and

2. Trial counsel had not adequately researched comparable capital murder statutes in other jurisdictions regarding the definition and application of the mitigating factors set forth in Va. Code Ann. § 19.2-264.4(B) (1977 Cum. Supp.).

Statement of Facts, p. 2.

The trial court conducted its own review of the record of the case, and, in its letter opinion, stated that it found no merit in Petitioner's claims. It is important to note that neither the Commonwealth nor the trial court contend that the allegations in the Petition are not sufficiently specific to be grounds for habeas corpus relief; the court found the allegations sufficient, but denied the Petition on the merits of the claim.

These allegations clearly involve matters not of record in the original trial. The court would find nowhere in the record anything dealing with the preparation of trial counsel on the psychiatric issues. In death penalty cases, of course, the preparation of the psychiatric issues is often the major preparation to be undertaken. That would be particularly true in a case such as this, in which there can be no serious question

about the guilt of the Petitioner. The only significant issue would then be the appropriate sentence.

Petitioner has suggested, through the Petition and through proffers to the court on November 10, 1981, some specific ways in which counsel's performance was inadequate. The facts that would substantiate those allegations are not of record.

The United States Supreme Court has often noted that matters of ineffective assistance often will not be apparent from the face of the record. On a different issue, Chief Justice Burger noted that the problem with ineffective assistance from joint representation is in what the advocate does not do. Holloway v. Arkansas, 435 U.S. 475, 490-91 (1978). In many of the cases of ineffective assistance of counsel, the basis for the finding of ineffective assistance was the failure of counsel to investigate certain defenses. See, e.g., Brennan v. Blankenship, 472 F.Supp. 149 (W.D.Va. 1979); Wood v. Zahradnick, 578 F.2d 980 (4th Cir. 1978); in these cases, the federal courts reversed convictions expressly because counsel did not adequately explore and develop psychiatric defenses.

In the instant case, of course, counsel made efforts to present evidence in mitigation, though the effort backfired badly. Dr. Bransfield's testimony consisted of the presentation of an opinion that Petitioner was suffering from "extreme mental or emotional disturbance" at the time of the offenses, without any explanation of that conclusion. On cross-examination, Dr. Bransfield's diagnosis of Petitioner was turned around, and that

sentencing hearing.

2. Counsel failed to develop and present adequately the psychiatric evidence sufficient to support a finding of the presence of mitigating mental abnormalities.

Petition for Writ of Habeas Corpus, p. 20.

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To say that trial counsel took a tactical gamble in their decision to put on Dr. Bransfield does not answer the question of ineffective assistance of counsel. The question, under federal law, is whether that tactical gamble "resulted from neglect or ignorance rather than from informed, professional deliberation. Marzullo v. Maryland, 561 F.2d 540, 544 (4th Cir.

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